A **LOW LONG YOONG & ANOR**

v.

LOW KOK CHOON & ANOR

B HIGH COURT MALAYA, PULAU PINANG
S NANTHA BALAN JC
[CIVIL SUIT NO: 22-364-2004(MT-1)]
23 SEPTEMBER 2013

C ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Setting aside - Delay in filing application - Whether justified - Whether judgment regularly obtained - Judgment obtained under O. 13 r. 4 Rules of the High Court 1980 - Whether dealt with claims for possession of immovable property and not for liquidated demands - Whether sum*
D *claimed represented general damages - Whether there were triable issues - Whether court's discretion warranted to set aside judgment in default*

CIVIL PROCEDURE: *Transfer of action - From one High Court to another - Suit initiated in Penang High Court - Whether important to*
E *ascertain which court had closest nexus to dispute - Consideration of - Whether defendant and witnesses resides in Kluang - Whether Muar High Court proper forum - Whether application to transfer suit ought to be allowed*

The main issue in contention herein was in relation to the setting
F aside of a judgment in default obtained by the plaintiffs. On 6 July 2004, the plaintiffs filed the present suit against the defendants at the Penang High Court ('the 2004 suit') in relation to an action for defamation. The 2004 suit was the sequel to an earlier suit which had been filed by the present plaintiffs against the
G defendants. Tracing back, the first suit was filed in 1998 pertaining to a property which belonged to the defendants. That suit, which was registered at the Penang High Court, was later transferred to the Muar High Court. In relation to the 2004 suit, the plaintiffs obtained a judgment in default pursuant to O. 13 r. 4 of the Rules
H of the High Court 1980 ('RHC') against the defendants for a sum of RM2,000,000 ('the JID'). The second defendant ('D2') applied to set aside the JID by an application which was filed on 20 October 2008 but later, withdrew it. During this time, D2's husband, *ie,* the first defendant ('D1') had passed away. However,
I D2 filed a second setting aside application *vide* encl. 57 and for an order to transfer the proceedings to the Muar High Court. D2 maintained that she was unaware of the 2004 suit and was under

the impression that this matter had been settled through the consent judgment in the Muar suit. To counter this argument, the plaintiffs contended that when D2 filed an originating summons ('OS') on 28 March 2008 for removal of a caveat, she knew of the JID as it was mentioned in D2's affidavit in support of the OS. Hence, it was argued that there was unreasonable delay by D2 to set aside the JID. Among the issues that arose for consideration were (i) whether the JID had been regularly obtained; (ii) whether the suit should be transferred to the Muar High Court; and (iii) whether D2 took fresh steps in the 2004 suit after becoming aware of the irregularity *vis-à-vis* the JID and thus, was precluded from applying to set aside the JID.

Held (allowing D2's application with costs):

(1) Delay alone is not the only criteria as the court retains a residual discretion to do justice by setting aside a default judgment where the circumstances are such that to allow the judgment to stand would be oppressive. Order 13 r. 4 of the RHC deals with claims for possession of immovable property and not for liquidated demands. On the facts, the JID was obtained under O. 13 r. 4 for the sum of RM2,000,000 as constituting 'relif, ganti rugi dan kerosakan'. The plaintiffs' subsequent reliance on O. 13 r. 1 was misplaced as the sum of RM2,000,000 was not pleaded as a claim for a liquidated demand but only as a sum representing general damages which had been quantified, but not proved. The practice of quantifying general damages has since been prohibited by O. 18 r. 12(1A) of the Rules of Court 2012 ('ROC') which stipulates that general damages shall not be quantified. Be that as it may, at the time when the pleadings were filed in the 2004 suit, quantification of general damages in this fashion was acceptable. However, merely because it was quantified, this did not mean that it could be exalted to the status of a claim for liquidated demand. (paras 24, 26, 28 & 39)

(2) With the passing away of D1, D2 needed time to recover from the loss and only applied in October 2008 to set aside the JID. The delay was about seven months if one were to compute the time from March 2008 when the OS was filed. There were extenuating circumstances and there was no unreasonable delay on D2's part in applying to set aside the

JID. D2 had also demonstrated that there was a *prima facie* defence on the merits which warranted a trial of the action. There was at least a triable issue as to whether the plaintiffs had violated the terms of the consent order recorded in the Muar suit. Further, the circumstances in this case were indeed compelling and warranted the exercise of the court's discretion to set aside the patently irregular JID. (paras 34, 38 & 42)

(3) The filing of the OS did not constitute a waiver. It was not to be equated to taking fresh steps. In order for there to be a waiver, fresh steps, if taken, must be within the same proceedings and must be a conduct which expressly or implicitly condones the irregularity. On the facts, there was no fresh step taken in the 2004 suit by D2 evincing any intention on her part to condone the irregularity *vis-à-vis* the JID. Hence, the filing of the OS was not to be construed as the taking of a fresh step. (para 35)

(4) The procedural provisions relating to transfer of a case from one division of the High Court to another division within West Malaysia is O. 57 of the ROC. The most important task in a transfer application is to ascertain which court has the closest nexus to the dispute. On the facts, D2 was about 80 years old and resided in Kluang; and the land which was the subject matter of the consent order and the 2004 suit was in Kluang. The 2004 suit revolved around the lands belonging to the defendants and the plaintiffs had pleaded forgery, extortion, defamation and misrepresentation, all of which were related to the lands. Further, if the suit were to remain in Penang, then the witnesses from Kluang, Muar and Johor Bahru would have to travel to Penang and this by itself was oppressive. Thus, the proper forum, *ie,* convenient forum for this matter was the High Court at Muar (*Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd;* refd). (paras 44-49)

Case(s) referred to:

Badrul Zaman PS Md Zakariah v. Tamil Nesan (M) Sdn Bhd [2002] 8 CLJ 86 HC ***(foll)***

Dr Mohd Yusof Ismail v. Hj Ismail Mohd Nor [2011] 1 CLJ 445 CA ***(refd)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***

Latew Bakuh & Anor v. Johari Abdullah & Ors [2009] 9 CLJ 353 HC ***(refd)***

Sin Hai Estate Berhad & Ors v. Lim Jit Kim & Ors [2003] 1 LNS 16 HC ***(refd)***

Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 CA ***(refd)***
Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] 1 LNS 55 HC ***(refd)***
Tetuan Tan Teng Siah Realty Sdn Bhd v. Island Oil Palm Plantations Sdn Bhd & Anor [1997] 4 CLJ 634 HC ***(refd)***
Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors [1999] 1 LNS 3 HC ***(refd)***
Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Berhad [1996] 1 CLJ 241 FC ***(refd)***
Witech Sdn Bhd & Ors v. BHR Group Ltd [2010] 9 CLJ 288 CA ***(refd)***
Yap Ke Huat v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 2, O. 13 rr. 1, 4
Rules of Court 2012, O. 18 r. 12(1A), O. 57

For the plaintiffs - Sunny Khoo; M/s Sunny Khoo & Co
For the defendants - K Gnasegaran (Tharma with him); M/s Segar & Co

Reported by Kumitha Abd Majid

JUDGMENT

S Nantha Balan JC:

Introduction

[1] The first plaintiff is Low Long Yoong. He is also known as Sunny Khoo and is a lawyer practising under the name and style of Messrs Sunny Khoo & Company in Penang. The second plaintiff is his wife. The first defendant ('D1') is the father of the first plaintiff and was a retired Chinese school headmaster in Kluang, Johor. He passed away on 6 May 2008 in Kluang, Johor. He was a bankrupt when he died. The second defendant ("D2") is the wife of D1 and mother of the first plaintiff.

[2] On 6 July 2004, the plaintiffs filed the present suit against the defendants at Penang High Court by way of Civil Suit No: 22-364-2004 ("the 2004 suit"). About a year later after the writ had been served by way of substituted service, the plaintiffs obtained judgment in default on 7 July 2005 against the defendants for a sum of RM2,000,000 ("the JID"). Apparently, the plaintiffs commenced bankruptcy proceedings against D2 based on a judgment taken in another court suit filed in the Penang High

Court (No: 22-501-2005) for RM1,000,000 and pursuant to which D2 was accordingly declared a bankrupt. Mr Sunny Khoo said that proof of debt was filed against D2 based on the JID in the 2004 suit. On the other hand, D2 says in paras. 2 and 5 of her affidavit (encl. 58) that both she and D1 were made bankrupt based on the JID. Be that as it may, in so far D2 was concerned, she was either made a bankrupt based on the JID or the sum stated in the JID was the basis on which proof of debt was filed. Either way, this does not matter as it has no impact on the issues pertaining to setting aside of the JID.

The 2008 Application To Set Aside The JID

[3] D2 applied to set aside the JID by an application which was filed on 20 October 2008 ("the 2008 application") through Messrs Segar & Co. By that time D1 had passed away. The 2008 application took a life of its own. What happened was that on 28 May 2009, the plaintiffs obtained an order, apparently, without the knowledge of D2's solicitors which states that D2's solicitors had agreed to withdraw the 2008 application (encl. 12) without liberty to file afresh ("the withdrawal order").

[4] It is alleged that the plaintiffs did not serve the draft copy of the withdrawal order for approval by D2's solicitors. Also, the sealed copy of the withdrawal order was not served on D2's solicitors. However, the plaintiffs served a sealed copy of the withdrawal order on the Insolvency Department and informed them that D2 had lost the case. The Insolvency Department called D2's solicitors and informed them of the situation. On 6 November 2009, Messrs Segar & Co, made an application to set aside the withdrawal order. The application was allowed by the Senior Assistant Registrar on 28 July 2010 with costs. The matter did not end there.

[5] The plaintiffs appealed to the judge in chambers and their appeal was dismissed with costs. The plaintiffs took it further and appealed to the Court of Appeal. On 30 August 2012, the Court of Appeal dismissed the appeal. Next, during case management on 6 May 2013 before the Deputy Registrar, D2's solicitors informed the court that they were withdrawing the 2008 application with liberty to file afresh because the plaintiffs raised preliminary objections on the jurat in D2's affidavit. The Deputy Registrar

allowed the application with costs. Thus, the merits of the 2008 application were never heard. This is therefore D2's second setting aside application (encl. 57) which was filed on 11 July 2013.

Mr Sunny Khoo's Appearance As Counsel

[6] Before going any further, there is a preliminary matter that I should deal with. It has to do with Mr Sunny Khoo's appearance in this case as counsel. He is the first plaintiff. His firm is on record as solicitors for the plaintiffs and significantly, Mr Sunny Khoo appeared as counsel for the plaintiffs. He did not appear as the first plaintiff "in person". In this case, there were all kinds of allegations that were being made by Mr Sunny Khoo (as first plaintiff) against the defendants and likewise by D2 against him. It was obvious that as a plaintiff, he has a pecuniary interest in the matter and would be a material witness if there were to be trial of the action. Also, the second plaintiff was his wife which means that he has a personal relationship with a party and a potential witness. Finally, there is a possibility of Mr Sunny Khoo's professional conduct being impugned. Of course that is not to say that I have made any findings whatsoever with regards to Mr Sunny Khoo's conduct in this matter. All that I can say at this juncture is that the allegations made against him by D2 are of a serious nature. So the question is whether he can or should act as counsel in this matter. In this regard, what I was concerned about were the following provisions of the Legal Profession (Practice and Etiquette) Rules 1978:

> 3. Advocate and solicitor not to accept brief if embarrassed
>
> (a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.
>
> (b) An embarrassment arises:
>
> (i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;
>
> (ii) where there is some personal relationship between him and a party or a witness in the proceedings.
>
> 4. No advocate and solicitor to accept brief if professional conduct likely to be impugned.

A No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

5. No advocate and solicitor to accept brief if difficult to maintain professional independence

B

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

C 27. Advocate and solicitor not to appear where pecuniarily interested

(a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.

D (b) ...

28. Advocate and solicitor not to appear in a case where he is a witness

(a) An advocate and solicitor shall not appear in Court or in E Chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardising his F client's interests.

(b) An advocate and solicitor shall not appear before an appellate tribunal if in the case under appeal he has been a witness on a material and disputed question of fact in the Court below.

G

(c) This rule does not prevent an advocate and solicitor from swearing or affirming an affidavit as to formal or undisputed facts in matters in which he acts or appears.

[7] Hence, there were obvious reasons why Mr Sunny Khoo H should not have appeared as counsel in this case. Therefore, it was necessary for me to raise this matter with Mr Sunny Khoo. I asked him whether it was proper for him to appear in the matter and his reply was that he has been acting as counsel all along without objection from anyone. I should add that my query to I Mr Sunny Khoo did not prompt any response from counsel who appeared for D2. Implicitly, it appeared to me that D2 was not

concerned about the propriety and/or the possible contravention of the Legal Profession (Practice and Etiquette) Rules 1978, *inter alia*, by reason of Mr Sunny Khoo appearing as counsel in a matter in which he is a party and has a pecuniary interest and is likely to be a material witness. In any event, since D2 was not desirous of taking issue with Mr Sunny Khoo appearing as counsel in the matter, I just left it at that. However, I thought that I should make mention of this in the judgment so that it becomes a matter of record, as to what transpired in the High Court on this issue, so that if objection is taken later, then this judgment will serve to indicate D2's position *vis-à-vis* Mr Sunny Khoo's participation in the case as counsel.

[8] Now, there are two applications that were made by D2. First, is D2's application (encl. 57) to set aside the JID. The second application by D2 is for an order to transfer the proceedings to the High Court at Muar (encl. 62). After hearing the parties I allowed the application in encl. 57 and set aside the JID. After the JID was set aside I also allowed the application to transfer the proceedings to the High Court at Muar (encl. 62) subject to certain directions relating to the filing of pleadings being fulfilled. These are my grounds in respect of both applications which were allowed in favour of D2.

The 2004 Suit

[9] The plaintiffs' action against the defendants in the 2004 suit is said to be based on a cause of action for defamation. But the statement of claim also makes reference to "pemalsuan tandatangan" and "extortion". However, for present purposes, what is of utmost importance is not so much the cause of action, but rather the reliefs sought as they have a direct impact upon the validity of the JID. The prayers sought in the action are as follows:

(i) Gantirugi dan kerosakan sebanyak Ringgit Malaysia Dua Juta (RM2,000,000.00) atau amaun yang dianggap sesuai oleh Mahkamah yang mulia ini;

(ii) Suatu perintah supaya Defendan-Defendan dihalang daripada mengupah, menggunakan orang lain untuk mencederakan, mengugut, menipu, menganiayakan Plaintif-Plaintif serta anak-anak Plaintif;

(iii) Suatu perintah supaya Defendan-Defendan dihalang menggunakan apa-apa jua 'suratsulit' serta orang lain yang berkuasa untuk menukar Plaintif-Plaintif ke tempat kerja

A lain, memusnahkan kerjaya Plaintif, mendatang kepejabat/sekolah untuk harass Plaintif-Plaintif, atau melalui telefon untuk harass dan mengugut Plaintif-Plaintif atau anak-anak Plaintif. Defendan-Defendan tidak akan menganiayakan Plaintif-Plaintif dengan apacara pun khasnya memalsukan tandatangan/initials Plaintif-Plaintif;

B

(iv) Gantirugi dan kerosakan Am;

(v) Gantirugi exemplari;

(vi) Gantirugi aggravated;

C

(vii) Kos; dan

(viii) Lain-lain relif yang dianggap sesuai dan manfaat oleh Mahkamah yang mulia ini.

D **The Judgment In Default**

[10] The JID is encl. 10 and its reads as follows:

PENGHAKIMAN

E (Aturan 13 Kaedah 4)

Tiada kehadiran telah dimasukkan oleh Low Kok Choon dan Hew Nyet Chen, Defendan-Defendan yang dinamakan di atas dalam tindakan ini.

F ADALAH PADA HARI INI DIHAKIMI bahawa Defendan-Defendan dikehendaki membayar kepada Plaintif-Plaintif untuk relif gantirugi dan kerosakan sebanyak Ringgit Malaysia Dua Juta (RM2,000,000.00) sahaja dan kos.

[11] As is self-evident, the JID is stated to be an order obtained G under O. 13 r. 4 of the Rules of the High Court 1980. But admittedly the JID has absolutely no causal connection with O. 13 r. 4 of the Rules of the High Court 1980. Also, there is no dispute that the JID was entered without any application being made to the court for leave to enter judgment for any particular H relief. There was no hearing at all. Also, the plaintiffs' other reliefs sought in the writ were not abandoned.

Historical Narrative

I **[12]** The 2004 suit is the sequel to an earlier suit which had been filed by the present plaintiffs against the same defendants. The first suit was filed on 12 March 1998 against the defendants

pertaining to property which belonged to the defendants. That civil suit was registered as Penang High Court Civil Suit No: 22-118-1998 ("the 1998 suit"). On 5 August 1999, the 1998 suit was transferred from Penang High Court to Muar High Court upon the direction of the Chief Justice of Malaya. The request for transfer was made by the defendants' former solicitors Messrs C Sukumaran & Co, Kluang, Johor. The matter was then re-registered as Muar High Court Civil Suit No: 22-64-1999 ("the Muar suit").

[13] What happened next was that on 31 May 2000, the plaintiffs and the defendants recorded a consent judgment in the Muar suit ("the consent judgment"). Also, there is a letter of undertaking dated 12 June 2000 signed by the plaintiffs in the presence of their solicitor, Mr V Amareson of Messrs Amareson & Meera which is said to arise out the consent judgment.

[14] This consent judgment states as follows:

(i) Plaintif mengemukakan satu surat akujanji berpihak kepada Defendan dalam tempoh 14 hari dari tarikh perintah ini yang mengandungi terma-terma berikut:

(ii) Plaintiff tidak akan mengambil sebarang prosiding undang-undang terhadap Defendan-Defendan berkaitan dengan hartanah yang dikenali sebagai LOT NO. PTB 5126 H.S. (D) 6618 Bandar Kluang, Johor dan juga berkaitan dengan lain-lain tanah yang dimiliki oleh Defendan-Defendan.

(iii) Plaintif tidak akan memasukkan sebarang Kaveat Persendirian ke atas hartanah tersebut dan juga tanah yang lain yang dimiliki oleh Defendan-Defendan.

(iv) Plaintif Kedua Low Long Yoong hendaklah menarik balik Kaveat Persendirian yang dimasukkan terhadap tanah tersebut.

D2's Knowledge Of The 2004 Suit

[15] In so far as the 2004 suit is concerned, D2 maintains that she was unaware of such a suit and was under the impression that this matter has been settled through the consent judgment in the Muar suit. D2 says that she only came to know of the 2004 suit when her account in Malayan Banking Berhad ("Maybank") was frozen in May 2008. D2 maintains that somewhere in late

May 2008, she received a letter from Maybank dated 21 May 2008 stating that they were freezing the account due to the bankruptcy proceeding that was taken against the defendants.

[16] At that material time, D2 was in bereavement as she was mourning the death of her husband, D1 who passed away on 6 May 2008. Somewhere in the middle of September 2008, D2 engaged Messrs Segar & Co, to represent her. On 20 October 2008, an application was filed to set-aside the JID. On 24 November 2008, D2 applied for a sanction from the Insolvency Department at Johor Bahru, Johor which was eventually given on 9 March 2010. The writ of summons in this suit was served on the defendants by way of substituted service ie, advertised in the SUN newspaper in the Malay language. This is the gist of D2's explanation for the delay in moving the court in setting aside the JID.

The Law

[17] The principles relating to setting aside of a judgment in default are fairly well established. I will just mention a few cases where the relevant principles have been stated or reformulated.

In *Yap Ke Huat v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175; [2008] 3 AMR 576 James Foong JCA held that:

> It is trite law that when considering an application to set aside a Judgment In Default, the first task is to ascertain whether the judgment is regular or irregular. If it is irregular judgment then it ought to be set aside *ex debito justitiae* but if it regularly obtained then the principles in Evans v Bartlam would apply.

[18] *Tetuan Tan Teng Siah Realty Sdn Bhd v. Island Oil Palm Plantations Sdn Bhd & Anor* [1997] 4 CLJ 634, Jeffrey Tan J held that:

> A judgment entered in default is not a judgment decided on merits and is liable to be set aside pursuant to O. 13 r. 8 RHC. Where the Judgment is regular there must be shown a defence on merits and where the Judgment In default is irregular it can be set aside as a matter of right

[19] In *Witech Sdn Bhd & Ors v. BHR Group Ltd* [2010] 9 CLJ 288; [2011] 1 AMR 92 Abdul Malik Ishak JCA held that:

> The judgments in default are irregular as they were obtained pursuant to O. 19 r. 2(1) RHC, which relates to a claim for liquidated demand only. As the respondent's statement of claim was not concerned with a claim for liquidated claim demand only, it was wrong for the respondent to invoke O. 19 r. 2(1) to secure Judgment In Default; they should have obtained pursuant to Order 19 r. 7(1). The aggrieved appellants are entitled to have the Judgments in default set aside *ex debito justitiae*.

[20] On the issue of delay in moving the court to set aside the default judgment, the following cases are relevant.

[21] In the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223, the Court of Appeal stated that:

> (2) It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, **he must do so timeously**. The maxim *vigilantibus*, *non dormientibus*, *jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases *where a right is exercisable ex debito justitiae, a court may refuse relief to an indolent litigant*.
> (emphasis added)

> (3) In all cases in which delay in approaching the court is in issue, the burden is upon **the litigant who has delayed to render a satisfactory explanation** for it ...
> (emphasis added)

[22] In *Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors* [1999] 1 LNS 3, Justice Richard Malanjum (as he then was) held:

> (1) The exercise of judicial discretion should be strict wherein there is delay in setting aside an irregular judgment or order.

> (2) even in an *ex debito justitiae* situation, **an indolent litigant is still required to give explanation for the delay.**
> (emphasis added)

> (3) Order 42 r. 13 of the RHC clearly states that it is "the party intending to set aside or vary such order or judgment [who] must make his application to the court and serve it on the party was has obtained the order or judgment within thirty days after the

A receipt of the order or judgment by him. Hence the first defendant's explanation that he should not be blamed for the delay since the plaintiffs did not make the first move to rectify the defective judgment and order is without merit and not reasonable in the circumstances."

B **[23]** In the case of *Latew Bakuh & Anor v. Johari Abdullah & Ors* [2009] 9 CLJ 353 the court held as follows:

(4) In view of **the very lengthy delay** in this case right from the time the default interlocutory judgment was served on the
C appellant to the time the appellants filed in their application to set aside the said judgment for *which no acceptable explanation was preferred, the court should not consider the merits of the application.*
(emphasis added)

[24] Of course, delay alone is not the only criteria as the court
D nevertheless retains a residual discretion to do justice by setting aside a default judgment where the circumstances are such that to allow the judgment to stand would be oppressive. In this regard, the following quotation from the judgment of Edgar Joseph Junior FCJ in *Tuan Haji Ahmed Abdul Rahman v. Arab Malaysian Finance*
E *Berhad* [1996] 1 CLJ 241 is relevant:

delay alone would not necessarily be fatal to the appellant's case. It is clear law that the court still retains a discretion to set aside an irregular judgment, if no one had suffered prejudice by reason of delay or where such prejudice has been sustained it can
F be met by an appropriate order as to costs or when the circumstances were such to let the judgment stand would constitute oppression. indeed, under its inherent jurisdiction to prevent an abuse of its proceedings, the court has the power to set aside a judgment in default, *even when the defendant's application*
G *is out of time, if the particular circumstances of the case require the intervention of the court.*
(emphasis added)

[25] It is with the above principles in mind that I proceeded to consider D2's application. Obviously, the imperative and primary
H question is whether the JID had been regularly obtained. If it is irregular, then provided there is a satisfactory explanation for the delay, it is to be set aside as of right. If it is a regular judgment, then the defendant has the burden of demonstrating a defence on merits.

I

[26] On the face of it, the JID is said to have been obtained under O. 13 r. 4 of the Rules of the High Court 1980 for the sum RM2,000,000 as constituting "relif, gantirugi dan kerosakan". Now, O. 13 r. 4 deals with claims for possession of immovable property. It is not for claims for a liquidated demand. It provides as follows:

> (1) Where a writ is indorsed with a claim against a defendant for possession or immovable property only, then if that defendant fails to enter an appearance the plaintiff may, after the time limited for appearing, and on producing a certificate by his solicitor, or (if he sues in person) an affidavit, stating that he is not claiming any relief in the action of the nature specified in Order 83, rule 1, enter judgment for possession of the immovable as against that defendant and costs, and proceed with the action against the other defendant, if any.
>
> (2) Where there is more than one defendant, judgment entered under this rule shall not be enforced against any defendant unless and until judgment for possession of the immovable property has been entered against all defendants.

[27] However, Mr Sunny Khoo readily conceded that the JID contains a typographical error and that it should read as O. 13 r. 1. Now, O. 13 r. 1 reads as:

> (1) Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

[28] It is clear that O. 13 r. 1 only entitles a party to enter a default judgment where it is a claim for a liquidated demand. So, by saying that the JID should read as having been obtained under O. 13 r. 1, it was being suggested that the plaintiffs had filed a claim for a liquidated demand in the sum of RM2,000,000. I will say more on this a little later on. For now, I would say that the plaintiffs' reliance on O. 13 r. 1 is misplaced as the sum of RM2,000,000 was not pleaded as a claim for a liquidated demand but only as a sum representing general damages which has been quantified (but not proven).

[29] In my view, the position in which the plaintiffs find or have placed themselves in is no different from the plaintiff in *Badrul Zaman PS Md Zakariah v. Tamil Nesan (M) Sdn Bhd* [2002] 8 CLJ 86; [2001] 4 MLJ 403 ("*Badrul Zaman*'s case) who entered judgment in default in a defamation suit where there was a claim for RM50 million as general damages and reliefs of injunction etc. In that case, the plaintiff prayed for the following reliefs:

(a) general damages which he quantified at RM50m as against each of the defendants;

(b) exemplary damages;

(c) special damages;

(d) an injunction restraining the defendant or their agents from repeating the libel against the plaintiff;

(e) costs; and

(f) interest.

[30] In *Badrul Zaman*'s case, the plaintiff had effected service of the writ on the first defendant on 15 May 2001. Despite service being properly effected, no appearance or pleadings were filed by the first defendant. On 28 May 2001, a certificate of non-appearance was filed against the first defendant, and on 30 May 2001, a judgment in default of appearance was entered against the first defendant. The judgment in default of appearance in *Badrul Zaman*'s case reads as follows:

PENGHAKIMAN INGKAR KEHADIRAN

Tiada kehadiran telah dimasukkan oleh defendan pertama dalam tindakan ini. Adalah pada hari ini dihakimkan bahawa defendan pertama hendaklah membayar kepada plaintif gantirugi am, teladan dan teruk ditaksirkan dan faedah pada kadar 8% setahun dari tarikh writ saman sehingga penyelesaian penuh dan kos.

Bertarikh pada 30 haribulan Mei 2001.

[31] It is significant to note that in *Badrul Zaman*'s case although there was a prayer for damages in the sum of RM50,000,000, judgment in default was not entered for that amount but rather interlocutory judgment (on liability) was entered and for damages

to be assessed. In contrast, in the 2004 suit, the plaintiffs herein proceeded to obtain the JID for the sum RM2,000,000 (*albeit* that this sum was not proven). Also, in the 2004 suit there were prayers for two different injunctions and other reliefs, all of which had not been abandoned. I will now quote *in extenso* the illuminating judgment of PS Gill J (as he then was) in *Badrul Zaman*'s case which is most relevant. He said:

> O. 13 r. 6 of the RHC would be the proper mode, if at all, to obtain a judgment in default of appearance. For ease of reference O. 13 r. 6(1) of the RHC reads as follows:
>
> > Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.
>
> The effect of O. 13 r. 6 of the RHC, to my mind, is to preclude a plaintiff from entering judgment in default of appearance in every case in which the indorsement on the writ contains, or includes, a claim which is not squarely within sub-rr (1) to (4) of this order, and to require him to proceed with the action as if the defendant had appeared. If therefore, there is indorsed on the writ, a claim for an account, injunction, specific performance, declarations, or rectification or other remedy or relief, which falls outside the descriptions specified in sub-rr (1) to (4), the plaintiff cannot enter judgment in default of appearance, unless he expressly and finally abandons every such remedy or relief.
>
> The rationale underlying the provisions of O. 13 r. 6(1) of the RHC, is that specific relief by its very nature is discretionary. A defendant may well decide not to defend an action in which such relief is claimed in the honest belief that he has no defence upon the question of liability. But that does not relieve the plaintiff from delivering his statement of claim and satisfying the court, upon a motion, that the case is one fit for the grant of specific relief. In this, I find support in the dicta of Gopal Sri Ram JCA, in the case of *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 3 CLJ 305; [1997] 2 MLJ 565 at p 582, where his Lordship had this to say:
>
> > When viewed in this fashion, it is not difficult to see why O. 13 r. 6 (1) is worded in the way in which it appears. The rule exists to preserve the discretion of the court in

> actions for specific relief despite the non appearance of a defendant. It is not a mere technicality, as suggested by counsel, but has to do with policy considerations that have evolved through the exercise of jurisdiction by a court of equity. To deprive a defendant the right of appearing upon the motion for judgment and arguing that discretion ought not to be exercised in a plaintiff's favour is a serious matter. It constitutes the breach of a substantive right forming part and parcel of the doctrine of procedural fairness. And the entry of a form of judgment in default in a case to which O. 13 r. 6(1) applied has the effect of withholding, from a defendant, without the court's sanction, the procedural fairness to which he is entitled.

[32] In the present case, Mr Sunny Khoo, counsel for the plaintiffs (and also the first plaintiff) conceded that this is a mixed claim and that leave of court should have been obtained to enter judgment. However he also said that the JID should read as O. 13 r. 1 and not r. 4. He says that this was just a typographical error and that there is no prejudice. However, he was not able to distinguish the *Badrul Zaman*'s case but he said that since D2 had failed to set aside the order for substituted service and is guilty of delay and had taken fresh steps, any irregularity *vis-a-vis* the JID had been waived by D2.

[33] Counsel then relied upon O. 2 r. 2 of the Rules of the High Court 1980 which has the effect of precluding a party from setting aside any order which is irregular if that party has taken fresh steps after becoming aware of the irregularity or defect. He then referred to the OS 24-1339-2008 ("the OS") for caveat removal which was filed by D2 in the Johor Bahru High Court on 28 March 2008 whereas encl. 12 (ie, the 2008 application - to set aside JID) was filed on 20 October 2008. It was suggested that when D2 filed the OS, she knew of the JID as it is mentioned as such in D2's affidavit in support of the OS. As such D2 is fixed with knowledge of the JID but only filed encl. 12 on 20 October 2008.

[34] According to plaintiffs' counsel, there was unreasonable delay on D2's part. In this regard, we have D2's assertion that she came to know of the bankruptcy only when in May 2008 she received a letter from Maybank regarding closure of the account. There is also evidence that on 6 May 2008 D1 (her husband) had passed away and she was in mourning. With the passing away of

her husband it is quite understandable that D2 would have needed time to recover from the loss and applied only in October 2008 to set aside the JID. I would therefore say that the delay is about seven months if one were to compute time from March 2008 when the OS was filed. As such I am of the view that there were extenuating circumstances and there was no unreasonable delay on D2's part in applying to set aside the JID. Of course encl. 12 was later withdrawn on 8 May 2013 and re-filed on 11 July 2013. But one cannot ignore the fact that in October 2008 D2 had already taken the necessary action to set aside the JID. The events that took place thereafter do not add to the delay.

[35] Next on waiver, I am of the view that the filing of OS does not constitute waiver. It is not to be equated to taking fresh steps. In order for there to be a waiver, fresh steps, if taken, must be within the same proceedings and must be conduct which expressly or implicitly condones the irregularity. So for example, filing of unconditional appearance (under the Rules of the High Court 1980) and filing defence would be "taking a fresh step". Also applying for security for costs in the same action would be taking a fresh step. Yet another example of taking a step would be in allowing a case to proceed to trial. That is not the case here. No fresh step was taken in the 2004 suit by D2 evincing any intention on her part to condone the irregularity *vis-à-vis* the JID. As such, I was not convinced that D2 had taken fresh steps in the 2004 suit after becoming aware of the irregularity *vis-à-vis* the JID and so she was not precluded from applying to set aside the JID. I therefore concluded that D2's filing of the OS was not to be construed as the taking of a fresh step.

[36] As for the failure on D2's part to set aside the substituted service, I am of the view that that is of no moment as what is before me is an application to set aside the JID which for reasons that will be apparent in the later part of this judgment is patently and inherently irregular and must be set aside *ex debito justitiae*.

[37] As observed earlier, the plaintiffs proceeded to obtain the JID for RM2,000,000, *albeit* that this was not a claim for a liquidated demand and had not been proven. Next, the plaintiffs various other reliefs were not abandoned. Hence, following *Badrul Zaman*'s case, the JID is bad and ought to be set aside.

[38] Hence, even though there was much delay by D2 in setting aside the JID, she had firstly, rendered an explanation as regards delay and secondly, I find that it would be oppressive not to set aside the JID which is irregular. The circumstances in this case were indeed compelling and warranted the exercise of the courts' discretion to set aside the patently irregular JID. In my view *Badrul Zaman*'s case sealed the fate of the JID which was blatantly and flagrantly in violation of the Rules of the High Court 1980 (which were the applicable rules at the material time). Indeed, the JID in the present case is far more irregular than the default judgment in *Badrul Zaman*'s case where it was only an interlocutory judgment on liability and for damages to be assessed.

[39] In the present case, the amount claimed in the 2004 suit by way of prayer (i) was by no means a claim for a liquidated demand. It was one of those prayers where there was a quantification of general damages, which is a much deprecated practice but which survived under the Rules of the High Court 1980 and was countenanced by the Court of Appeal in *Dr Mohd Yusof Ismail v. Hj Ismail Mohd Nor* [2011] 1 CLJ 445; [2011] 5 MLJ 900 CA and *Skrine & Co v. MBf Capital Bhd & Anor* & Other Appeals [1998] 3 CLJ 432; [1998] 3 MLJ 649, CA. The practice of quantifying general damages has since been prohibited by O. 18 r. 12(1A) of the Rules of Court 2012 ("ROC") which stipulates that general damages shall not be quantified. Be that as it may, at the time when the pleadings were filed in the 2004 suit, quantification of general damages in this fashion was acceptable. But merely because it is quantified does not mean that it can be exalted to the status of a claim for liquidated demand.

[40] So when Mr Sunny Khoo said that the JID should have read as a default judgment having been obtained under O. 13 r. 1 of the Rules of the High Court 1980, he was way off the mark for several reasons. First, the prayer reads as:

> Gantirugi dan kerosakan sebanyak Ringgit Malaysia Dua Juta (RM2,000,000.00) atau amaun yang dianggap sesuai oleh Mahkamah yang mulia ini

This is by no reasons a claim for a liquidated demand. Second, it might (at best) be regarded as a claim for general damages which has been somewhat quantified. Even then the purported quantification is ambiguous as it says "Ringgit Malaysia Dua Juta (RM2,000,000) atau amaun yang dianggap sesuai oleh Mahkamah yang mulia ini".

[41] So obviously, this is a prayer for general damages and the quantum of which can only be determined after an assessment of damages either before the judge or registrar. But even if that route had been taken, the JID would still be defective based on *Badrul Zaman*'s case. The legal effect of quantifying general damages (which is prohibited under the ROC) is that it has to be assessed but the claimant is not entitled to claim an amount which is more than what has been pleaded. Finally, none of the other prayers in the writ were not abandoned. Thus, on any analysis, the JID is doomed and ought to be set aside.

[42] In any event, looking at the plaintiffs' pleaded case, the consent judgment in the Muar suit, the letter of undertaking and the proposed draft defence (exh. N annexed to D2's affidavit - encl. 58), it is clear that this case must go for trial as the cause papers are littered with a plethora of hotly disputed issues, of a legal and factual nature. In the result, I was satisfied that D2 had satisfactorily explained the delay in making the application to set aside the JID and that she had not taken a fresh step in the proceedings (ie, in the 2004 suit) after becoming aware of the irregularity *vis-à-vis* the JID and finally that based on the affidavits that were placed before me, D2 had demonstrated that there was a *prima facie* defence on merits which warranted a trial of the action. At the very least, there is at least a triable issue as to whether the plaintiffs have violated the terms of the consent order recorded in the Muar suit. If that is not a triable issue or a defence on merits, then I don't know what is.

[43] Ultimately, it was clear that the JID was irregular and ought to be set aside *ex debito justitiae*. In any event, D2 had shown that there was a *prima facie* defence on merits. In the circumstances and for the reasons as stated above, I was of the view that the JID should be set aside and allowed encl. 57 with costs of RM7,500 to be paid by the plaintiffs to D2 (through Jabatan Insolvensi Johor Bahru as D2 is a bankrupt).

Order 57 ROC

[44] The procedural provisions relating to transfer of a case from one division of the High Court to another division within West Malaysia is O. 57 of the ROC. The relevant provision reads as follows:

> 1. (1) Where the Judge of High Court or a Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that court can be more conveniently or fairly

tried in some other court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to other court.

(2) A transfer of any proceedings from:

(a) a Subordinate Court to High Court; or

(b) the High Court to a Subordinate Court,

shall only be made by an order of that High Court Judge on application by any party by originating summons or notice of application, whichever is appropriate.

(3) A transfer of any proceedings from:

(a) a Magistrates' Court to a Sessions Court; or

(b) a Sessions Court to Magistrates' Court,

shall only be made by an order of that Sessions Judge on application by any party by originating summons or notice of application, whichever is appropriate.

(4) Before making any order to transfer any proceedings from:

(a) the High Court to another High Court or co-ordinate jurisdiction;

(b) a Subordinate Court to High Court; or

(c) a Subordinate Court to another Subordinate Court;

the High Court or the Judge of the Sessions Court or Magistrate, as the case may be, shall take into consideration whether the High Court or Subordinate Court which shall hear the case is located at or nearest to the place where:

(A) the cause of action arose;

(B) the defendant, or one of the several defendants, resides or has his place of business;

(C) the facts on which the proceedings are based exist or are alleged to have occurred;

(D) the land the ownership of which disputed is situated; or

(E) for others reasons it is desirable in the interest of justice that the proceedings should be transferred. A

(5) In this Order, "Subordinate Court" means the magistrates' court or the Sessions Court.

[45] In my view, the most important task in a transfer application is to ascertain which court has the closest nexus to the dispute. In *Sin Hai Estate Berhad & Ors v. Lim Jit Kim & Ors* [2003] 1 LNS 16; [2003] 2 AMR 336 His Lordship Justice Abdul Malik Ishak (after examining all the factors) expressed it in the following manner: B C

> Everything seemed to have taken place in Malacca. Convenience would dictate that Malacca should be the right forum.

[46] Next, *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55; [1988] 2 MLJ 268 the late Mr Justice Lim Beng Choon's discussion on the power and jurisdiction of the court and the factors to be taken into account in determining the most convenient forum is relevant and I quote: D

> ... a branch of the High Court located in any state has concurrent jurisdiction to entertain any civil proceedings; otherwise the mere consent of the parties given under section 23(1) of the 1964 Act that a civil suit be tried in a state other than the state where the four criteria are applicable would be otiose simply because if a court has no jurisdiction to deal with a matter no consent of the parties can confer jurisdiction on the court. For the above reasons I hold that this court certainly has jurisdiction to entertain the present civil proceedings notwithstanding that the four criteria stipulated in section 23(1) of the 1964 Act are not applicable. However, that is not the end of the matter since the defendants have also contended that this court is not the proper or convenient forum to determine the dispute between the parties. To this contention, I agree. It is quite obvious that in creating a branch of the High Court in Malaya in each state, the legislature had two things in mind: E F G
>
> (i) to enable the parties of a civil suit to have easy access to a branch of the High Court in Malaya located in a state where either the plaintiff or the defendant resides. When a person is sued for breach of contract or for that matter a tortious act when the breach or the tort was committed in the state where he resides, it is certainly unreasonable to require him to travel all the way, say, to Kuala Lumpur to defend himself. Apart from the expense incurred, the defendant may H I

have to remain in Kuala Lumpur perhaps one week to participate in the civil proceedings. No doubt he would be compensated in terms of costs should he succeed in defending himself but the inconvenience caused may outweigh the amount of costs awarded to him;

(ii) the obvious reason for the setting up of a branch of the High Court in Malaya in every one of the 11 states is to facilitate the disposal of cases in Malaya and to cut down, even if it is not yet possible to obliterate, the backlog of cases pending in any one or more of the branches of such High Court.

For the reasons as stated above, I do not think that the present civil proceedings should be dealt with by this court. I am also of the view that it is for the defendants to apply to this court for a transfer of the civil suit and the application made by the plaintiffs under Order 81(1) to the High Court in Malaya at Penang or Kuala Lumpur since the cause of action arose in Penang but the parties have their places of business in Kuala Lumpur.

Transfer Of Suit To Muar High Court

[47] Mr Sunny Khoo was vehement in his objection and wanted the 2004 suit to remain in the Penang High Court. He said that the 2004 suit had no nexus with the Muar High Court. He said that previously D2 had applied to have the 2004 suit transferred to the Johor Bahru High Court which shows that D2 is herself unsure as to the proper court which should hear the matter. He suggested that to the extent that the plaintiffs claim was based on defamation, the cause of action occurred in Penang and so the suit should remain in Penang. But there are various other considerations that I cannot ignore. D2 resides in Kluang. The land which is the subject matter of the consent order and the 2004 suit is in Kluang. The 1998 suit which is connected to the 2004 suit, was transferred from Penang High Court to the Muar High Court. Ultimately, I was convinced that the only persons who would benefit if the suit were to remain in Penang are the plaintiffs as they would not have to travel to the Muar High Court. On the other hand if the suit were to remain in Penang, then the witnesses from Kluang, Muar and Johor Bahru would have to travel to Penang. That in itself is oppressive.

[48] In the present case, it cannot be gainsaid that the cause of action in the 2004 suit revolves around the lands belong to the defendants. D2 is about 80 years old and resides in Kluang, Johor. The plaintiffs have pleaded forgery, extortion, defamation and misrepresentation, all of which all relates to the lands. Admittedly, there are also investigations by the police in the state of Johor that are afoot which relate to the consent judgment. Significantly, the 1998 suit had been transferred from the Penang High Court to Muar High Court and registered as Civil Suit No: 22-64-1999 upon the direction by the Chief Judge of Malaya. Thus, it is apparent that many of the potential witnesses are or will be from Johor. Indeed, even the Deputy Registrar of the High Court at Muar may have to testify.

[49] After taking into account all the factors alluded to above, I was of the view that the proper forum ie, convenient forum for this matter was the High Court at Muar. I therefore ordered that the suit be transferred to Muar High Court after close of pleadings ie, after filing of the defence and counterclaim which is to be filed within one week from today and reply and defence to counterclaim to be filed within two weeks from date of filing/service of defence/counterclaim. I ordered that the file be transferred to Muar High Court after 23 October 2013. Costs of this application fixed at RM3,000 to be costs in the cause of the suit.

Order accordingly.